

BRYAN M. BROWN
Claimant

STATE OF KANSAS
Respondent

STATE SELF-INSURANCE FUND
Insurance Carrier

[illegible]

The record considered by the Appeals Board is enumerated in the Award of the Special Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Special Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Special Administrative Law Judge found claimant entitled to permanent partial general body disability benefits based upon an eleven percent (11%) work disability. The respondent and its insurance carrier appeal from the findings of the Special Administrative Law Judge and request the Appeals Board review the finding of nature and extent of disability and whether it was proper for the Special Administrative Law Judge to consider the testimony taken by deposition of Lloyd D. Langston. Those are the issues now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds, as follows:

(1) Claimant is entitled to receive permanent partial general disability benefits based upon the five percent (5%) impairment of function rating provided by Dr. Joseph G. Sankoorikal.

Claimant sustained a back injury while at work for the respondent, Youth Center at Topeka on September 6, 1991. After receiving a period of treatment, claimant ultimately returned to the respondent in an accommodated position on January 9, 1993. Although claimant testified that he was to receive the same salary that he had at the time of his injury, he believes he currently receives \$20 to \$30 per month less. No explanation for the discrepancy is provided.

Although the Special Administrative Law Judge found claimant returned to the same job and same wage he was receiving at the time of his work-related accident, the Special Administrative Law Judge, without providing explanation, did not apply the presumption of no work disability contained in K.S.A. 1991 Supp. 44-510e. The statute provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Because the Appeals Board finds the claimant returned to work for the respondent at a comparable wage and there is no indication that the job is other than permanent, the presumption of no work disability is applicable. Therefore, claimant is entitled to permanent partial disability benefits based upon the percentage of functional impairment of five percent (5%) as provided by Dr. Sankoorikal.

Although the presumption of no work disability is not conclusive, the evidence fails to rebut it in this case. Vocational expert Lloyd D. Langston testified that claimant would sustain a loss of wage of twenty-five percent (25%) if he lost his job at the Youth Center. However, this evidence is not sufficient to overcome the presumption. One of the main objectives of the Workers Compensation Act is to return employees to work earning a comparable wage. This was accomplished by the State and it should receive benefit for its efforts. Should the claimant lose his position with the State, he retains the right to seek review and modification of this Award.

Dr. Sankoorikal was the only physician to testify in this proceeding. The doctor, authorized as the treating physician, believes claimant either has a mild bulge or a herniated nucleus pulposus in his lumbar spine. The doctor in reaching this conclusion had the benefit of a CT scan and MRI. As a result of the work-related injury, Dr. Sankoorikal believes claimant has sustained a five percent (5%) permanent partial impairment of function to the body as a whole and should observe restrictions of no lifting greater than fifty (50) pounds and avoiding repetitive pushing, pulling, bending and quick movements. Although claimant's counsel cited specific pages and tables in the AMA Guides to the Evaluation of Permanent Impairment, Third Edition, and attempted to get the doctor to raise his impairment of function rating, Dr. Sankoorikal did not alter his opinion and explained why his rating should not be modified. Although his opinion was challenged, the Appeals Board finds Dr. Sankoorikal's impairment of function rating of five percent (5%) to be both credible and persuasive.

(2) Respondent and its insurance carrier contend Mr. Langston's deposition should not have been considered by the Special Administrative Law Judge. After reviewing the procedural history in this proceeding and the orders pertaining to terminal dates, the Appeals Board finds respondent's argument without merit. The Special Administrative Law Judge extended claimant's own terminal date and placed no restrictions or limitations on his right to present evidence. Should a similar problem arise in the future, the parties may consider filing a request to either quash the deposition or extend their own terminal date, neither or which was attempted in this circumstance.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey entered in this proceeding on May 3, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Bryan M. Brown, and against the respondent, State of Kansas, and its insurance carrier, for an accidental injury which occurred September 6, 1991 and based upon an average weekly wage of \$368.52, for 68 weeks of temporary total disability compensation at the rate of \$245.69 per week or \$16,706.92, followed by 347 weeks at the rate of \$12.28 per week or \$4,261.16 for a 5% permanent partial general disability, making a total award of \$20,968.08.

As of February 17, 1995, there is due and owing claimant 68 weeks of temporary total disability compensation at the rate of \$245.69 per week or \$16,706.92, followed by 112.14 weeks of permanent partial disability compensation at the rate of \$12.28 per week in the sum of \$1,377.08, for a total of \$18,084.00 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$2,884.08 is to be paid for 234.86 weeks at the rate of \$12.28 per week, until fully paid or further order of the Director.

The orders of the Special Administrative Law Judge in the Award of May 3, 1994, that are not inconsistent with the above are hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Frank D. Taff, Topeka, KS
Billy E. Newman, Topeka, KS
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director

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